No. 09-1021

In The Supreme Court of the United States

GREG JOHN,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT, a Political Subdivision of the State of Nevada; TOM MORGAN, an Individual; KATHERINE MILNER, an Individual; GARY DIEDRICH, an Individual; and MARTY SWISHER, an Individual,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Nevada

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REBECCA BRUCH
Counsel of Record
ANN M. ALEXANDER
ERICKSON, THORPE & SWAINSTON, LTD.
99 W. Arroyo Street
Reno, Nevada 89509
(775) 786-3930
rbruch@etsreno.com

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Nevada Supreme Court affirmed the dismissal of federal claims brought by the petitioner in a Nevada district court. The dismissal was pursuant to application of Nevada's anti-SLAPP statute, which permits state courts to dismiss claims brought to punish or chill the speech of those who petition the government when the claims have no merit.

The question presented is:

Should this Court grant review to consider whether the Nevada Supreme Court properly affirmed dismissal of federal claims where:

(a) the Nevada Supreme Court decision does not conflict with any decision of this Court, the federal courts of appeals, or any other state court of last resort;

(b) the objection raised in the petition concerning statutory limitations on discovery was not raised, argued, or preserved below;

(c) federal legislation pending in the U.S. Congress would eliminate the argument that federal claims brought in federal court are not subject to a similar procedural statute; and

(d) the decision to grant respondents' special motion to dismiss was based on the merits, and the facts in petitioner's case could not support his claims under any procedure for review?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

A. Facts And Proceedings Below 1

B. The Nevada Anti-SLAPP Statute 5

SUMMARY OF ARGUMENT 7

REASONS FOR DENYING THE WRIT 9

A. The Nevada Supreme Court Decision Does Not Conflict With Any Decision Of This Court, The Federal Courts Of Appeals, Or Any Other State Court Of Last Resort 9

1. There Is No Conflict With Any Decision Of This Court 9

2. There Is No Conflict With Any Decision Of The Federal Courts Of Appeals 13

3. There Is No Conflict With Any Decision Of A State Court Of Last Resort 16

B. The Objection Raised In The Petition Concerning Statutory Limitations On Discovery Was Not Raised, Argued, Or Preserved Below 17

TABLE OF CONTENTS – Continued

Page

C. Federal Legislation Pending In The U.S. Congress Would Eliminate The Argument That Federal Claims Brought In Federal Court Are Not Subject To A Similar Procedural Statute 19

1. The *Noerr-Pennington* Doctrine Similarly Immunizes Defendants In § 1983 Litigation 20

2. The Citizen Participation Act Of 2009, If Passed, Will Provide Federal Anti-SLAPP Immunity 22

D. The Decision To Grant Respondents' Special Motion To Dismiss Was Based On The Merits, And The Facts In Petitioner's Case Could Not Support His Claims Under Any Procedure For Review 23

CONCLUSION 27

APPENDIX

Congressional Record Service (CRS) Summary of H.R. 4364 ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Ambus v. Granite Brd. of Ed., 995 F.2d 992 (10th Cir. 1993) 13, 14

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986) 13

Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937 (2009) 7

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955 (2009) 7

Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790 (1980) 10, 11

Boulware v. Nevada Dept. of Human Resources, 960 F.2d 793 (9th Cir. 1992) 21

Bradbury v. Superior Court, 49 Cal.App.4th 1108, 57 Cal.Rptr.2d 207 (Cal.App.2.Dist. 1996) 16

Celotex v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986) 13

Eastern R. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523 (1961) 20

Empress L. [illegible] City and County of S.F., 419 F.3d 1052 (9th Cir. 2005) 21

Evers v. County of Custer, 745 F.2d 1196 (9th Cir. 1984) 21

Felder v. Casey, 487 U.S. 131, 108 S.Ct. 2302 (1988) 12, 13

TABLE OF AUTHORITIES – Continued

Page

Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951 (2006) 26

Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2d Cir. 1992) 13, 14

Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430 (1990) 10, 11, 12

Kimes v. Stone, 84 F.3d 1121 (9th Cir. 1996) 14

Manistee Town Center v. City of Glendale, 227 F.3d 1090 (9th Cir. 2000) 22

Martinez v. California, 444 U.S. 277, 100 S.Ct. 553 (1980) 10

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986) 13

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978) 10, 13

Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398 (1980) 10

United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965) 21

U.S. ex rel. Newsham v. Lockheed Missiles, 190 F.3d 963 (9th Cir. 1999) 15

Vergos v. McNeal, 146 Cal.App.4th 1387, 53 Cal.Rptr.3d 647 (Cal.App.3.Dist. 2007) 16

Webb v. Sloan, 330 F.3d 1158 (9th Cir. 2003) 13, 14

TABLE OF AUTHORITIES – Continued

Page

U.S. CONSTITUTION:

U.S. Const. Amend. 1 20

U.S. Const. art. VI, cl. 2 11

STATUTES:

NRS §§ 41.637 *et seq.* 2

NRS § 41.637.3 ..... 5, 6

NRS § 41.650 ..... 5, 6

NRS § 41.660.2 6

NRS § 41.660.3(a) 2, 3, 13, 17

NRS § 41.660.3(a)-(b) 17

NRS § 41.660.4 6

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983 ..... *passim*

RULES:

Federal Rules of Civil Procedure, Rule 8 15

Federal Rules of Civil Procedure, Rule 12 15

Federal Rules of Civil Procedure, Rule 56 15

Federal Rules of Civil Procedure, Rule 56(f) 18

Nevada Rules of Civil Procedure, Rule 56(c) 6

Nevada Rules of Civil Procedure, Rule 56(f) 18

United States Supreme Court, Rule 10 27

TABLE OF AUTHORITIES – Continued

Page

NEVADA LEGISLATIVE HISTORY:

1997 Nev. Stat., ch. 387, preamble, at 1364 5

PROPOSED LEGISLATION:

H.R. 4364 – Citizen Participation Act of 2009.....19, 22

OPINIONS BELOW

The opinion of the Nevada Supreme Court that is the subject of this petition is published at 219 P.3d 1276. See Pet. App. A.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. Facts And Proceedings Below.

This case arises out of an employment discrimination lawsuit. Petitioner Greg John was employed as a security guard for the Douglas County School District. An investigation into his misconduct was prompted after another security guard complained that petitioner engaged in unprofessional conduct when he improperly videotaped a special education student at the high school, created a loathsome, sexually explicit narration to accompany the videotape, and then invited coworkers to his office to show off his work. In the course of investigating this misconduct, another staff member complained she had been sexually harassed by petitioner. Following the investigation, petitioner was suspended. He appealed the suspension, the suspension was upheld, and he abandoned further grievance review.

He then filed an Equal Employment Opportunity Commission (EEOC) complaint, and an investigation was conducted. The EEOC issued a Dismissal and Notice of Rights letter stating it was unable to conclude that there was any statutory violation. After the EEOC dismissed his complaint, the petitioner filed a lawsuit in Nevada district court alleging violations of state and federal law. In his lawsuit, he named individuals who had participated in the investigations into his misconduct, as well as the school district. It was clear to the school district that petitioner intended to punish those who had participated in the school district investigation and discipline process by naming each of them as individual defendants in his lawsuit.

One year later, petitioner was fired after he refused to cooperate with the school district's investigation into allegations that he improperly obtained confidential student records. He amended his complaint to add the school principal as a defendant, and the school district filed a special motion to dismiss under Nevada's anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute. See Nevada Revised Statutes (NRS) §§ 41.637 *et seq*. A special motion to dismiss under the anti-SLAPP statute is treated as a motion for summary judgment. NRS § 41.660.3(a).

The district court provided petitioner with two separate opportunities to place into evidence any facts that would support his claims. His first opportunity was in his opposition to the special

motion to dismiss. In that opposition, the petitioner simply incorporated two paragraphs directly from his complaint as factual support for his claims. After reviewing respondents' motion, petitioner's opposition, and respondents' reply, the district court judge convened a hearing. After hearing the arguments of counsel, the court gave petitioner another opportunity to set forth facts in support of his claims in supplemental points and authorities in opposition to the special motion to dismiss. When the petitioner filed his supplemental points and authorities, he attached a five-page declaration setting forth the evidence to support his claims.

When the briefing was complete, the district court evaluated the special motion to dismiss under summary judgment standards, as required by the anti-SLAPP statute. NRS § 41.660.3(a). When the facts petitioner alleged did not create a genuine issue of material fact as to the probability of success on the merits, his claims were dismissed. Pet. App. B at 33a-34a.

Petitioner appealed the dismissal to the Nevada Supreme Court. Nevada does not have an intermediate appellate court, and customary procedure is for the court to appoint three-judge panels to hear and decide cases, with availability of a petition for rehearing *en banc*. In this instance, the Nevada court took a rare opportunity to hear this case *en banc*, and thereafter rendered a unanimous decision in favor of respondents.

In the Nevada Supreme Court appeal, petitioner raised two issues. First, he alleged that Nevada's anti-SLAPP statute did not apply to his federal causes of action. The Nevada Supreme Court disagreed, and held that Nevada's anti-SLAPP statute does apply to federal claims brought in state courts because "it is a neutral and procedural statute that does not undermine any federal interests." Pet. App. A at 3a.

The second issue petitioner raised was whether the district erred in dismissing his claims under the statute. Notably, petitioner was given three different opportunities by the Nevada Supreme Court to demonstrate that below he had established the existence of a genuine issue of material fact so as to preclude summary judgment. These opportunities were provided through his opening brief, his reply brief, and in a supplemental brief ordered by the court.

In a unanimous decision, the Nevada Supreme Court affirmed the dismissal for two reasons. The court first concluded that the communications by school district employees and the district regarding petitioner's conduct and the resulting investigations were protected under the anti-SLAPP statute. Under the anti-SLAPP statute, it was the petitioner's burden to demonstrate a genuine issue of material fact regarding his claims. The Nevada Supreme Court held that the petitioner failed to do so, and therefore his claims were properly dismissed by the trial court. Pet. App. A at 3a.

B. The Nevada Anti-SLAPP Statute

A SLAPP is a "meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." Pet. App. A at 7a (citations omitted). The Nevada Legislature passed anti-SLAPP legislation in 1993 to provide a procedural mechanism for early dismissal of SLAPP lawsuits. The statute was amended in 1997, and at that time "the Legislature explained that SLAPP lawsuits abuse the judicial process by chilling, intimidating, and punishing individuals for their involvement in public affairs." Pet. App. A at 8a, citing 1997 Nev. Stat., ch. 387, preamble, at 1364. "The Legislature further reasoned that the number of SLAPP lawsuits in Nevada had increased, and therefore, implementation of an anti-SLAPP statute was essential to protect citizens' constitutional rights." *Id.*

Nevada's anti-SLAPP statute provides that "[a] person who engages in good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon the communication." NRS § 41.650. Good faith communications in furtherance of the right to petition include any "written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law, which is truthful or made without knowledge of its falsehood." NRS § 41.637.3. Such communications include the kinds of communications necessary for investigating and reporting workplace misconduct.

If an action is brought against a person, business or organization based upon good faith communications in furtherance of the right to petition, a defendant may file a special motion to dismiss within 60 days after service of a complaint. NRS § 41.660.2. In the special motion, "the moving party must first make a threshold showing that the lawsuit is based on good faith communications made in furtherance of the right to petition the government." Pet. App. A at 11a. NRS § 41.650. If that showing is made, "then the burden of production shifts to the nonmoving party, who must demonstrate a genuine issue of material fact." *Id.* If the nonmoving party does not carry its burden to demonstrate a genuine issue of material fact, the motion to dismiss will be granted. "[T]he dismissal operates as an adjudication upon the merits." *Id.*, citing NRS § 41.660.3-4 and Nevada Rules of Civil Procedure, Rule 56(c).

As the Nevada Supreme Court pointed out, "Nevada's anti-SLAPP statute is not an absolute bar against federal substantive claims; rather, it bars claims from persons who seek to abuse other citizens' rights to petition their government, and it allows meritorious claims against citizens who do not petition the government in good faith." Pet. App. A at 9a.

SUMMARY OF ARGUMENT

In its unanimous *en banc* decision, the Nevada Supreme Court held that Nevada's anti-SLAPP statute can be applied to federal claims brought in state courts. The court also affirmed the decision of the district court below that because the petitioner did not show a genuine issue of material fact, dismissal of his federal claims was proper as a matter of law.

Throughout this case, the petitioner has erroneously sought to cast the anti-SLAPP statute as an impermissible immunity. In fact, the statute does not operate as an immunity at all. It is nothing more than a procedural mechanism for early dismissal of unworthy lawsuits, and it operates in a fashion almost identical to a motion for summary judgment. It does not close the courthouse door to any particular litigants or kinds of claims, nor does it add or subtract elements from an existing cause of action. It does not impose an increased burden of proof or an unwieldy procedure. Petitioner's argument that the statute creates an immunity that undermines important federal interests has been unpersuasive and remains so.

This Court has clearly signaled that procedural rules giving courts an opportunity for prompt review of meritless claims are not disfavored. Recently, the Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2009), and *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009), suggest

there is nothing at all improper about a procedural mechanism which allows a federal court to test the merits of a case at the earliest opportunity.

In his petition, petitioner contends that a federal claim brought in a Nevada state court cannot be subject to the state anti-SLAPP statute. For four reasons, the question presented by the petition does not warrant further review by this Court.

First, the petitioner has failed to document any conflict between or among the decision of the Nevada Supreme Court and this Court, the federal courts of appeals, or the state courts of last resort. *Second,* petitioner for the first time in this case has raised an objection to the statutory limitations on discovery in Nevada's anti-SLAPP statute. This objection, framed as a burden on federal interests, was never raised, argued, or preserved below, and thus is not properly before this Court. *Third,* legislation pending in the U.S. Congress, if passed, will provide an anti-SLAPP procedure in the federal courts, eliminating the argument that no federal claim in a federal court would ever be subject to this procedure. Also, under the *Noerr-Pennington* doctrine, federal claims are already subject to a similar early dismissal. *Fourth,* petitioner's claims were ultimately dismissed because he simply had no facts to prove the alleged violations of federal law. Thus, even if the case is remanded for review under another procedural mechanism, the outcome will be the same.

For any of these reasons, petitioner's case does not warrant this Court's attention and the petition should be denied.

REASONS FOR DENYING THE WRIT

A. The Nevada Supreme Court Decision Does Not Conflict With Any Decision Of This Court, The Federal Courts Of Appeals, Or Any Other State Court Of Last Resort.

In a futile attempt to demonstrate conflict worthy of this Court's attention, petitioner has cited a number of cases where federal courts did not apply state statutes that immunized particular defendants based on their status, or immunized defendants against certain kinds of claims, or served absolutely to bar access to the courts. These cases do not support petitioner's aim to show conflict, because unlike Nevada's anti-SLAPP statute, these cases deal with immunities that bar claims without regard to the merits of the claims. For this reason, not one of the cases cited by petitioner demonstrates conflict with the decision of the Nevada Supreme Court.

1. There Is No Conflict With Any Decision Of This Court.

Petitioner states that the Nevada Supreme Court has decided "an important federal question in a way that conflicts with relevant decisions of this Court."

Pet. at 5. However, there is no conflict with any of the decisions cited by petitioner.

To begin, there is no conflict with this Court's decision in *Howlett v. Rose*. In *Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430 (1990), the U.S. Supreme Court held that a state's sovereign immunity law protecting municipalities from federal suit under 42 U.S.C. § 1983 was ineffective in light of the Court's ruling in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018 (1978), holding that municipal corporations are "persons" subject to § 1983 suit.

Nevada's anti-SLAPP statute differs significantly from a sovereign immunity statute because it does not bar all claims. It dismisses claims that are demonstrably without merit. See discussion *infra*. Thus, there is no conflict with *Howlett* based on an argument that the anti-SLAPP immunizes any entity from suit under § 1983. For the same reason, there is no conflict with this Court's decisions in *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398 (1980) (holding municipality has no immunity from liability under § 1983), or *Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553 (1980) (holding public employees have no absolute immunity from liability under § 1983). Petitioner's reference to *Board of Regents v. Tomanio,* 446 U.S. 478, 100 S.Ct. 1790 (1980) undercuts his arguments, since in that case this Court upheld application of the New York statute of limitation and the New York rule for tolling that statute, resulting in a dismissal of the respondent's

§ 1983 claims. The decision and analysis in *Tomanio* is certainly not in conflict with the decision of the Nevada Supreme Court.

There is also no conflict with the *Howlett* Court's analysis of the applicability of state procedural rules to federal claims in state courts. To the contrary, the Nevada Supreme Court relied substantially on *Howlett* for its determination that "Nevada's anti-SLAPP statute is a neutral procedural statute" (Pet. App. A at 19a), which does not create a "substantive cause of action or defense." Pet. App. A at 18a. "Instead," the court explained, "like rules of civil procedure, the statutes create a procedural mechanism to prevent wasteful and abusive litigation by requiring the plaintiff to make an initial showing of merit." *Id.*

The authority of state courts to decide federal claims arises from the federal Supremacy Clause, U.S. Const. art. VI, cl. 2, which "charges state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett,* 496 U.S. at 367, 110 S.Ct. 2430. "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Howlett,* 496 U.S. at 372, 110 S.Ct. 2430 (internal quotes deleted).

The *Howlett* Court explained that "a State may adopt neutral procedural rules to discourage frivolous litigation of all kinds, as long as those rules are not preempted by valid federal law. A State may not,

however, relieve congestion in its courts by declaring a whole category of federal claims to be frivolous." *Howlett,* 496 U.S. at 380, 110 S.Ct. 2430. The Nevada anti-SLAPP statute has not declared a whole category of federal claims to be frivolous. Instead, the statute provides Nevada's courts with a procedural rule to determine whether suits are meritorious. "The adequate-state-ground doctrine accords respect to state courts as decision-makers by honoring their modes of procedure." *Howlett,* 496 U.S. at 370, 110 S.Ct. 2430.

The Nevada Supreme Court, relying on *Howlett,* concluded that Nevada's neutral anti-SLAPP statute, enacted to prevent an abuse of the judicial process through groundless civil actions, may be applied to federal claims in state courts. Pet. App. A at 3a. There is no conflict with this Court's decision in *Howlett.*

Petitioner also alleges that the Nevada Supreme Court's failure to consider the underlying rationale in *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302 (1988), requires reversal of the decision below. Pet. at 3. Respondents disagree.

The kinds of procedural rules in state courts that offend *Felder* are those which predictably produce different outcomes in § 1983 litigation based solely on whether the claims were brought in state or federal court. Because Nevada's anti-SLAPP statute requires that claims only be dismissed if a plaintiff fails to create a genuine issue of material fact, the statute does not predictably produce different outcomes.

The anti-SLAPP statute specifically requires that claims be evaluated on their merits according to summary judgment standards. NRS § 41.660.3(a). Those standards derive from this Court's seminal decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). Thus, under the anti-SLAPP statute, claims are judged on their merits, and nothing about the application of Nevada's anti-SLAPP statute to federal claims conflicts with this Court's decision in *Felder*.

2. There Is No Conflict With Any Decision Of The Federal Courts Of Appeals.

Petitioner contends that the Nevada Supreme Court decision conflicts with decisions of the United States courts of appeals. However, there is no conflict with any of the decisions cited by petitioner.

As evidence of conflict with federal court decisions, petitioner has cited a string of cases which simply establish that one kind of state law immunity – sovereign immunity for municipalities – cannot be applied by state or federal courts after this Court's decision in *Monell* to immunize cities, school boards, and other local government entities from suit in § 1983 actions. See *Webb v. Sloan*, 330 F.3d 1158 (9th Cir. 2003); *Ambus v. Granite Brd. of Ed.*, 995 F.2d 992 (10th Cir. 1993); and *Goldberg v. Town of Rocky Hill*,

973 F.2d 70 (2d Cir. 1992). Petitioner has also cited *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996) where the court held that a state law "litigation privilege" which absolutely immunized attorneys participating in judicial proceedings from tort liability could not be applied to § 1983 actions. There is no conflict between the *Kimes* decision and the Nevada Supreme Court because the anti-SLAPP statute does not immunize any defendants from liability so long as the underlying claims have merit.

The cases cited by petitioner do not conflict with the decision of the Nevada Supreme Court. The court observed that "While it is true that state sovereign immunity is not a defense to a § 1983 claim, there is a significant difference between state sovereign immunity and Nevada's anti-SLAPP statute." Pet. App. A at 13a. The court further explained:

> Nevada's anti-SLAPP statute, however, is not an absolute bar to liability. Whereas immunity would bar all claims including meritorious claims, Nevada's anti-SLAPP statute differs as it permits cases to proceed to discovery and trial after a nonmoving party makes an initial demonstration of merit.

Id. Because Nevada's anti-SLAPP statute does not function similarly to a sovereign immunity or any other rule which bars particular claims or immunizes particular defendants, as opposed to dismissing claims on the merits, there is no conflict with *Webb*, *Ambus*, *Goldberg*, or *Kimes*.

In *U.S. ex rel. Newsham v. Lockheed Missiles*, 190 F.3d 963, 973 (9th Cir. 1999) the federal court analyzed California's anti-SLAPP statute and concluded that the statute was properly applied to the state law counterclaims in the federal court. In fact, the Nevada Supreme Court cited *Lockheed* for its recognition that "both California's anti-SLAPP statute and the Federal Rules of Civil Procedure 'serve similar purposes, namely the expeditious weeding out of meritless claims before trial.'" Pet. App. A at 19a, citing *Lockheed*, 190 F.3d at 972.

Importantly, the *Lockheed* court held that application of the statute would not result in any "direct collision" with a Federal Rules of Civil Procedure Rule 12 motion to dismiss or a Rule 56 motion for summary judgment. *Lockheed* at 972. The court further explained that "there is no indication that Rules 8, 12, and 56 were intended to occupy the field with respect to pretrial procedures aimed at weeding out meritless claims." *Id.* The *Lockheed* court did not rule that state anti-SLAPP procedures could not be applied to federal claims in state courts, because that issue was not before the court. This case does not conflict with the decision of the Nevada Supreme Court, and its reasoning supports that decision.

3. There Is No Conflict With Any Decision Of A State Court Of Last Resort.

There are no other decisions in the state courts of last resort which address the question presented by petitioner, so no conflicts have arisen among the states which would suggest a compelling need for review by this Court.

The decision of the Nevada Supreme Court does align with lower state court decisions. For example, the California Court of Appeal has held that California's anti-SLAPP statute may be applied to federal claims brought in state courts. In *Bradbury v. Superior Court,* 49 Cal.App.4th 1108, 57 Cal.Rptr.2d 207 (Cal.App.2.Dist. 1996), the plaintiff brought § 1983 claims in a state court, and argued that California's anti-SLAPP statute did not apply to his claims because the anti-SLAPP statute "violates federal substantive law." *Bradbury*, 57 Cal.Rptr.2d at 213. The California Court of Appeal disagreed, holding that "where the action is founded on a federal statute and brought in state court, state procedure controls unless the federal statute provides otherwise." *Id.* (citations omitted).

See also *Vergos v. McNeal,* 146 Cal.App.4th 1387, 53 Cal.Rptr.3d 647 (Cal.App.3.Dist. 2007), where the California Court of Appeal reaffirmed that "Federal civil rights claims brought in California are subject to section 425.16 [California's anti-SLAPP statute] motions." *Vergos* at 651, citing *Bradbury* at 213. In this matter, the California Court of Appeal concluded

that the anti-SLAPP statute applied to the § 1983 claims and granted the motion after finding that the plaintiff had no evidence that McNeal violated his civil rights.

Because there is no conflict with decisions of this Court, the federal courts of appeals, or any other state court of last resort, this matter does not merit review and the petition should be denied.

B. The Objection Raised In The Petition Concerning Statutory Limitations On Discovery Was Not Raised, Argued, Or Preserved Below.

The *second* reason for refusing to grant the petition is that petitioner's objection to Nevada's anti-SLAPP statute concerning the statutory limitations on discovery was not raised, argued, or preserved below.

Nevada's anti-SLAPP statute states that if a special motion to dismiss is filed, the court shall "(a) treat the motion as a motion for summary judgment; [and] (b) stay discovery pending: (1) a ruling by the court on the motion; and (2) the disposition of any appeal from the ruling on the motion." NRS § 41.660.3(a)-(b). The Nevada Rules of Civil Procedure contain a provision paralleled in the Federal Rules of Civil Procedure which allows a court to permit limited discovery when a motion for summary judgment is pending. Such a request for limited discovery could have been made by petitioner in the

case below. See Nevada Rules of Civil Procedure, Rule 56(f) and Federal Rules of Civil Procedure, Rule 56(f). Petitioner never made such a request.

In his summary of argument, the petitioner complains *for the first time* that it is the anti-SLAPP statutory limitation on discovery that burdens federal rights. In this regard, he alleges:

> The anti-SLAPP statute must be invoked without any opportunity for the usual discovery that would be available in federal court before a dispositive motion on immunity is considered. The federal civil rights plaintiff in a Nevada state court must thus be able to create a genuine issue of material fact on his claims at the outset, and must do so with no discovery, or his or her federal claims will be dismissed. This greatly impedes the federal civil rights plaintiff in Nevada state court, and thwarts congressional intent that these claims be adjudicated on their merits absent the applicability of some *federal* immunity.

Pet. at 2 (emphasis in original).

Later, petitioner repeats this objection:

> But [the anti-SLAPP statute] does more than just provide expressly for an "immunity" (contrary to the Nevada Supreme Court's reading of the law as not providing an immunity). It forecloses discovery on the federal claim and requires a federal claim plaintiff to demonstrate a genuine issue of

> material fact before any discovery can ever take place.

Pet. at 3-4.

If, as petitioner suggests, the statutory limitation on discovery posed the most significant threat to federal claims, then he should have raised this issue below. However, petitioner's objection to the discovery limitations was never raised, argued, or decided below. Because the petitioner never requested an opportunity for discovery, he was never denied an opportunity for discovery. Consequently, the Nevada Supreme Court decision contains no discussion of this issue and no rulings which are available for review by this Court.

Because the record below contains no facts, legal analysis, or conclusions of law on this issue, the petition should be denied for failure to preserve the issue below.

C. Federal Legislation Pending In The U.S. Congress Would Eliminate The Argument That Federal Claims Brought In Federal Court Are Not Subject To A Similar Procedural Statute.

The *third* reason for denying the petition is that the U.S. Congress presently has before it H.R. 4364, the Citizen Participation Act of 2009, which if passed will create a federal anti-SLAPP statute. And even if this bill does not become law, the federal courts have long imposed a similar immunity under the *Noerr-Pennington* doctrine.

Respondents begin with a discussion of the *Noerr-Pennington* doctrine, and then discuss the pending federal legislation.

1. The *Noerr-Pennington* Doctrine Similarly Immunizes Defendants In § 1983 Litigation.

Petitioner claims that Nevada's "anti-SLAPP statute, applied to federal claims, immunizes respondents from liability in a way that could never occur in federal court." Pet. at 2. Later, petitioner alleges that the statute "thwarts a congressional remedy by placing a burden on the exercise of a federal right by forcing victims who seek § 1983 redress in state courts to comply with a requirement that is absent from § 1983 litigation in federal courts." Pet. at 4. Neither of these representations is accurate, because the federal *Noerr-Pennington* doctrine provides similar immunities for defendants in § 1983 litigation brought in federal court.

The *Noerr-Pennington* doctrine derives from the First Amendment's guarantee of "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. 1. Under the *Noerr-Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct. *Eastern R. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961);

United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965).

The clearest evidence that § 1983 claims are not impermissibly burdened by state anti-SLAPP statutes is provided in the line of federal court cases that apply *Noerr-Pennington* immunity to a variety of defendants (including individuals and government entities) in § 1983 claims related to the defendants' lobbying or petitioning of public authorities. See, e.g., *Manistee Town Center v. City of Glendale,* 227 F.3d 1090 (9th Cir. 2000), where a shopping center brought a § 1983 action alleging that the city's lobbying of the county not to enter into a lease with it deprived the shopping center of property without due process of law. The federal district court dismissed the shopping center's claims on the ground that the city's actions were immunized under the *Noerr-Pennington* doctrine. The Ninth Circuit affirmed the dismissal. See also *Boulware v. Nevada Dept. of Human Resources,* 960 F.2d 793, 800 (9th Cir. 1992); *Evers v. County of Custer,* 745 F.2d 1196, 1204 (9th Cir. 1984); *Empress LLC v. City and County of S.F.,* 419 F.3d 1052, 1056 (9th Cir. 2005).

In its decision, the Nevada Supreme Court commented favorably on the similarity of purpose between Nevada's anti-SLAPP statute and the *Noerr-Pennington* immunity doctrine, noting that "The basis of this doctrine is that representative democracy demands that citizens and public officials have the ability to openly engage in discussions of public

concern." Pet. App. A at 9a, citing *Manistee Town Center,* 227 F.3d at 1093.

The *Noerr-Pennington* doctrine is frequently applied in federal courts to § 1983 claims, countering petitioner's argument that federal claims in federal courts are not subject to similar treatment. Thus, this argument merits no review.

2. The Citizen Participation Act Of 2009, If Passed, Will Provide Federal Anti-SLAPP Immunity.

H.R. 4364, the Citizen Participation Act of 2009, was introduced in the U.S. Congress on December 15, 2009. The official Congressional Research Service (CRS) summary of the proposed legislation is attached in the Appendix.

According to the bill, the goal of H.R. 4364 is to protect the constitutional rights of petition and free speech by creating immunity from and procedures to dismiss and deter SLAPPs brought in the federal courts. Petition activity includes statements made before or submitted to a government body or activity encouraging others to make or submit such statements.

The legislation proposes a set of procedural mechanisms that are very similar to the procedures in Nevada's anti-SLAPP statute. The proposed Act allows a defendant to bring a special motion to dismiss the lawsuit within 45 days. The defendant first shows that the lawsuit arose from protected speech or

petition activity; the plaintiff must then demonstrate that the claim is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment. If the plaintiff cannot meet this burden, the lawsuit is dismissed. The hearing and the ruling on the motion are expedited, and discovery proceedings are stayed until the motion is resolved. The court for good cause may order that specified discovery be conducted.

If this proposed legislation becomes law, then the question of whether federal claims are impermissibly subject to state anti-SLAPP statutes will be settled. For this reason, the decision of the Nevada Supreme Court that a federal claim brought in state court is subject to the procedures in the state's anti-SLAPP statute does not merit this Court's review, and the petition should be denied.

D. The Decision To Grant Respondents' Special Motion To Dismiss Was Based On The Merits, And The Facts In Petitioner's Case Could Not Support His Claims Under Any Procedure For Review.

In the closing paragraph of his Argument, petitioner requests that the Court grant the petition, reverse the Nevada Supreme Court decision, and remand the case for further proceedings absent the application of the anti-SLAPP statute. Pet. at 7. The *fourth* reason this Court should not grant the petition is because the ultimate decision to dismiss petitioner's

claims was based on the merits, and the facts in his case would not support his claims even if the anti-SLAPP statute were not applied. Under any procedural rule for adjudicating the merits of petitioner's claims, the claims will fail for lack of evidence.

Once the Nevada Supreme Court determined the anti-SLAPP could be applied to petitioner's federal claims for discrimination based on religion and disability, and for violations of his First Amendment rights, the court reviewed the substantive decision made below. Because petitioner produced no facts to prove his claims, the claims were dismissed. Pet. App. A at 3a. His position has been, and continues to be, that he was never obligated to show a genuine issue of material fact because the statute was preempted by federal law. Pet. at 7. Petitioner says that for this reason he "could have stood mute, declining to try to demonstrate a genuine issue of material fact." *Id.*

If he had stood mute, this strategy could have been seen as the noble effort of the litigant refusing to play a game whose rules he believes do not apply to him. And that is exactly how he wants this Court to interpret his inability to provide the Nevada district court with the facts necessary to survive a motion for summary judgment – even after he was given a supplementary opportunity to do so. To reinforce this interpretation, he states: "For purposes of this Petition, this Court should assume that is what occurred, as petitioner's position is that he did not have to show a genuine issue of material fact under a statute that is preempted by federal law." Pet. at 7.

The problem with this argument is that it is not what occurred in this case. The petitioner did not "decline to try" – he did try, and he failed. He did not stand mute. He put the facts that he had before the district court. Those facts were simply insufficient to create a genuine issue of material fact, and that is why his claims were dismissed. Moreover, as pointed out above, he never once in any pleading blamed the anti-SLAPP statute's limitation on discovery for his failure to put the necessary facts before the district court.

In this regard, the Nevada Supreme Court found:

1. Petitioner claimed religious-based discrimination, but the school district submitted evidence that it was not aware of petitioner's religious beliefs. "In response, John failed to provide any evidence of religious discrimination other than his own general allegations in his pleadings." Pet. App. A at 20a.

2. Petitioner claimed disability-based discrimination based on his alcoholism, but he "failed to provide any documentation supporting his claimed disability or adverse employment treatment." Pet. App. A at 20a. "Further, when responding to John's EEOC complaint, the DCSD stated that it did not know of John's alcoholism, and he never sought accommodation for any disability." *Id.*

3. Petitioner also alleged violations of his First Amendment right of free speech. After the school district discovered his inappropriate and offensive use of school surveillance equipment, his access to video

equipment was removed and he objected. Pet. App. A at 20a-21a. The Nevada Supreme Court observed that at its hearing on the appeal, petitioner failed to rebut the district's argument that under *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), his objections to the removal of his surveillance duties are not protected communications. Pet. App. A at 21a. As the court pointed out, under *Garcetti,* "when a public employee is not speaking as a citizen on a matter of public concern, then the employee has no First Amendment cause of action against the employer for its reaction to the speech." Pet. App. A at 21a, citing *Garcetti,* 547 U.S. at 418.

Based on the law in light of these undisputed facts, the court properly affirmed the district court's dismissal of petitioner's religious discrimination, disability discrimination, and First Amendment claims.

The Nevada Supreme Court made absolutely clear that petitioner's failure to rebut respondents' facts "does not mean Nevada's anti-SLAPP statute undermined or frustrated any federal substantive claims. On the contrary, John could have proceeded with his federal substantive claims had he shown a genuine issue of material fact." Pet. App. A at 22a. The court further clarified: "In other words, Nevada's neutral and procedural anti-SLAPP statute neither undermines nor frustrates John's federal substantive claims." *Id.* Nothing stood in the way of petitioner's claims going forward except their own unworthiness.

In the end, judicial disposition of this case, whether decided based on a special motion to dismiss under Nevada's anti-SLAPP statute, or under any other procedural motion to dismiss or motion for summary judgment, would produce the same result. The claims would be dismissed for lack of evidence – as they should be.

For this reason, even if the Court found a compelling reason to review the issue, it is unlikely there would be an impact on the ultimate disposition of the case. Therefore, this particular case does not present an appropriate vehicle for resolution of the question petitioner has presented for review.

CONCLUSION

Petitioner has failed to provide compelling reasons for this Court to grant the writ. The petition does not meet the standard for certiorari under United States Supreme Court Rule 10 and should be denied.

Respectfully submitted,

REBECCA BRUCH
Counsel of Record
ANN M. ALEXANDER
ERICKSON, THORPE & SWAINSTON, LTD.
99 W. Arroyo Street
Reno, Nevada 89509
(775) 786-3930

Counsel for Respondents

APPENDIX

Congressional Record Service (CRS) Summary of H.R. 4364

Title: Citizen Participation Act of 2009
Sponsor: Rep Cohen, Steve [TN-9] (introduced 12/16/2009) Cosponsors (1)
Latest Major Action: 12/16/2009 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

SUMMARY AS OF:
12/16/2009 – Introduced.

Citizen Participation Act of 2009 – Declares that Strategic Lawsuits Against Public Participation (SLAPPs), filed against thousands of individuals, organizations, and businesses based upon their valid exercise of the rights to petition or free speech, are an abuse of the judicial process that waste judicial resources and clog the already over-burdened court dockets.

Declares immune from civil liability any act of petitioning the government made without knowledge of falsity or reckless disregard of falsity. Requires a plaintiff (especially in a SLAPP) to prove knowledge of falsity or reckless disregard of falsity by clear and convincing evidence.

Provides that any act in futherance [sic] of the constitutional right of petition or free speech shall be entitled to the procedural protections provided in this Act.

Allows a party to file a special motion to dismiss any claim arising from an act or alleged act in furtherance of the constitutional right of petition or free speech within 45 days after service of the claim if the claim was filed in federal court or, if the claim was removed to federal court pursuant to this Act, within 15 days after removal.

Exempts from this Act: (1) certain procedural protections in any action brought solely on behalf of the public or solely to enforce an important right affecting the public interest; and (2) certain claims for relief involving commercial speech.